



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 167100

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Pursuant to petition filed July 7, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, August 18, 2015 at 01:00 PM at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Representative: Tanya Allen, Fraud Investigator

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
██████████  
██████████

**ADMINISTRATIVE LAW JUDGE:**

Mayumi Ishii  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. The Respondent received FoodShare benefits from December 2013 through February 2015. (Exhibit 1A/C)

2. On June 5, 2013, the Respondent completed an ACCESS application, indicating he was homeless, but living in Wisconsin. The application included a penalty warning and the Respondent electronically signed the application indicating that the information was correct and complete and that he understood the penalties for providing false information or breaking the rules. (Exhibit 4A)
3. On June 6, 2013 and again on June 12, 2014, the county agency sent the Respondent Eligibility and Benefits Booklets that advised the Respondent of the penalties for providing false information, including disqualification from the FoodShare program. (Exhibits 3A and 4B)
4. On December 16, 2013, the Respondent completed a renewal/Six Month Report Form, indicating he was homeless, but living in Wisconsin. He provided a telephonic /electronic signature, indicating that the information was correct and complete. (Exhibit 3C)
5. On June 11, 2014, the Respondent called the county agency to complete a renewal. He again indicated that he was homeless, but living in Wisconsin. The Respondent provided a telephonic/electronic signature indicating that the information he provided was correct and complete. (Exhibit 3E)
6. On December 12, 2014, the Respondent completed a renewal, again stating he was homeless, but living in Wisconsin. The Respondent provided a telephonic signature, indicating that the information was correct and complete. (Exhibits 2 and 3G)
7. Between December 2013 and March 2015, the Respondent's EBT card was used exclusively in the state of Georgia. (Exhibit 4C)
8. The Respondent reported an address in Georgia to his employers, between June 2014 and January 2015. (Exhibit 4D)
9. On July 10, 2015, OIG prepared an Administrative Disqualification Hearing Notice, alleging that the Respondent violated the rules of the FoodShare program between December 2013 and February 2015 by providing false information regarding his residence. (Exhibit 6)

## **DISCUSSION**

### *Respondent's Non-appearance*

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member*

*has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

*Emphasis added*

The hearing in this case took place on August 18, 2015. The Administrative Disqualification Hearing Notice was sent to the Respondent at two addresses in Georgia and an address in Wisconsin. Ms. Allen testified that these were the last known addresses for the Respondent and that OIG did not receive any returned mail.

The notice advised the Respondent of the date and time of the hearing. The notice further told the Respondent to contact “Judge Ishii” with a phone number where the Respondent could be reached for the hearing. The Respondent did not contact me with a phone number.

An attempt was made to contact the Respondent at (414) [REDACTED], the phone number listed for the Respondent in the CARES database, but there was no answer. Consequently, the hearing took place in the Respondent’s absence.

The Respondent did not contact the Division of Hearings and Appeals and he did not submit anything within 10 days of the hearing date. As such, it is found that the Respondent did not have good cause for his non-appearance.

*What is an Intentional Program Violation (IPV)?*

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department’s written policy restates federal law, below:

**3.14.1 IPV Disqualification**

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

*FoodShare Wisconsin Handbook, §3.14.1.*

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make

restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

*What is OIG's Burden of Proof?*

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

*The Merits of OIG's case*

"A household shall live in the State in which it files an application for participation" in the food stamp program. 7 *CFR* §273.3(a)

OIG asserts that the Petitioner lied by falsely claiming a Wisconsin residence, from December 2013 through February 2015.

The Respondent completed and signed applications and renewals on June 5, 2013, December 16, 2013, June 11, 2014 and December 12, 2014, in which he claimed to be a Wisconsin resident. These documents are reliable as regularly kept business records of the State of Wisconsin and as statements of a party opponent.

According to the EBT Edge Report, the Respondent's EBT card was used exclusively in Georgia, during the time in question. The report is reliable, as a regularly kept business record of the State of Wisconsin.

It is difficult to believe the Respondent was a Wisconsin resident, doing all of his grocery shopping in Georgia. I note that according to the Work Number records, the Respondent reported a Georgia residence to two, different employers. Accordingly, it is found that OIG has met its burden to prove, by clear and convincing evidence, that the Respondent lied between December 2013 and February 2015 by claiming to be a Wisconsin resident when, in fact, he was living in Georgia.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977). There is nothing in the record to rebut the presumption that the Respondent intentionally lied about his residence between December 2013 and February 2015, in order to obtain FoodShare benefits that he was not entitled to receive. On the contrary, Mr. [REDACTED] received an Eligibility and Benefits Booklet in June 2013 that warned him about the penalties for providing false information, including disqualification. He acknowledged his understanding of this warning every time he signed an application or renewal, but he still lied about his residence.

Based upon the record before me, I find that OIG has established by clear and convincing evidence, that the Respondent intentionally violated FoodShare program rules, and that this violation was the first such violation committed by the Respondent. Therefore, OIG correctly seeks to disqualify the Respondent from the FoodShare program for one year.

#### **CONCLUSIONS OF LAW**

1. The Respondent violated, and intended to violate 7 CFR §273.3(a) and 7 CFR 273.16, by providing false information about his residence.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the Respondent.

**NOW, THEREFORE**, it is

**ORDERED**

That OIG's determination is sustained, and that OIG may make a finding that the Respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

#### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

#### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

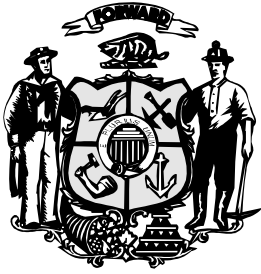
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 9th day of September, 2015.

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\sMayumi Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
Tanya Allen - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAMail@wisconsin.gov](mailto:DHAMail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on September 9, 2015.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[tanya.allen@wisconsin.gov](mailto:tanya.allen@wisconsin.gov)